No. 84-127

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARDSON-MERRELL INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE

1. The Decision Below Wrongly Abolishes as a Matter of Law the Established Authority of the District Courts to Disqualify Counsel for Misconduct 3

2. The Court Below Brushed Aside the Clearly Erroneous Rule and the Abuse of Discretion Standard of Review 4

   a. The Clearly Erroneous Rule 4

   b. The Abuse of Discretion Standard 5

3. The Court Below Wrongly Held That an Attorney May Not Be Disqualified for Releasing Material Which Has Been Ruled Inadmissible With Intent to Circumvent the Ruling and to Prejudice an Opponent 6

4. Attorney Disqualification Orders in Civil Cases Are Not Subject to Interlocutory Appeal Under *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984) 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Board of Education v. *Nyquist*, 590 F.2d 1241 (2d Cir. 1979) 3

Flanagan v. *United States*, 104 S. Ct. 1051 (1984) 7-8

	PAGE
National Hockey League v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976)	3, 5
Roadway Express, Inc. v. *Piper*, 447 U.S. 752 (1980)	3
State v. *Kavanaugh*, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968)	6
Statutes and Rules	
Code of Professional Responsibility	6
Other Authorities	
Reply Brief for Petitioners, *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984)	8

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PETITIONER'S REPLY BRIEF

This reply brief is submitted on behalf of the petitioner in order to correct the most serious misstatements of fact and distortions of issues in respondents' Brief in Opposition ("Opp.").

In an effort to paper over the freewheeling *de novo* fact-finding of the Court of Appeals, respondents repeatedly assert that the facts in this case are "undisputed" (Opp. 2, 4, 11, 17). This assertion is false. Its falsity is apparent from a simple comparison of the opinions of the District

Court and the Court of Appeals. As to Allis, the District Court found an intent "to thwart a true investigation of a crucial witness in this case" (Pet. 77a), while the Court of Appeals found that his actions "can more easily be understood to reflect a desire to get at the truth and to protect the interest of his client rather than to 'thwart a true investigation' " (Pet. 47a); a sharper conflict between the finding of the District Court and that of the Court of Appeals would be hard to imagine.* The trial court further found that Allis intended to procure a retraction of a statement already given by his secretary to the defendant (Pet. 76a), an issue which even respondents admit was in dispute (Opp. 4 n.2), and listed four facts supporting its findings as to Allis's intent (Pet. 76a-77a), which respondents dispute in a lengthy footnote (Opp. 7-8 n.4). As to Butler, the District Court found an intent to circumvent its orders and to prejudice the defendant (Pet. 78a), a finding which the Court of Appeals went out of its way to question (Pet. 51a),** and made a *de novo* finding of absence of prejudice despite the presence of contrary evidence in the record and in the teeth of a specific request for a remand on this issue (Pet. 12, 22, 51a).

Respondents' argument that the issues presented by the petition herein "have no serious claim to the time and attention of this Court" (Opp. 13; *see also* Opp. 18, 19-20) is based entirely upon respondents' false assertion that the

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* Respondents try to escape this factual conflict by suggesting that the District Court's finding meant only that Allis failed to conduct a true investigation of his client's fraud (Opp. 17). But the District Court's finding will not bear this construction. The District Court found, not merely that Allis had failed to make a true investigation, but also that he had tried to thwart one (Pet. 76a-77a).

** Respondents assert that the Court of Appeals accepted this finding as a premise for analysis (Opp. 12 & n.5, 17), but the Court of Appeals made no such statement (*see* Pet. 51a).

facts assumed by the Court of Appeals were undisputed. In actuality, the facts were sharply disputed, and the Court of Appeals reached the result it desired only by rewriting and ignoring the findings of grave misconduct made by the District Court. If this were permitted, the historic power of the District Courts to supervise the conduct of attorneys in cases before them (*see* Pet. 15 n.* and cases cited) would be deprived of meaning. The defense of the primary role of the District Courts in controlling misconduct in cases before them is indeed worthy of the time and attention of this Court. *See, e.g., Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764-67 (1980); *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976).

1. The Decision Below Wrongly Abolishes as a Matter of Law the Established Authority of the District Courts to Disqualify Counsel for Misconduct

The court below held as a matter of law that counsel may not be disqualified for misconduct unless such misconduct is "likely to infect future proceedings" (Pet. 38a). It made clear that under this standard disqualification would be limited essentially to past and present conflicts of interest, to the exclusion of other forms of misconduct (Pet. 37a-38a). Respondents argue that the rule of law thus adopted by the court below was correct and should not be disturbed by this Court (Opp. 9-10, 14-17).

The sole authority cited in support of this rule of law, either by respondents (Opp. 16) or by the court below (Pet. 37a-38a), is *Board of Education* v. *Nyquist*, 590 F.2d 1241 (2d Cir. 1979). We showed in our petition that the *Nyquist* case did not involve actual misconduct by counsel and therefore has nothing to do with the question presented here

(Pet. 17). Respondents have not attempted to show otherwise. We further showed that the cases involving misconduct by counsel have upheld disqualification without adopting the restrictive standard laid down by the court below (Pet. 15-16 n.**). Respondents attempt to distinguish these cases on their facts (Opp. 16 n.7), but they do not deny that none of these cases adopted the legal standard of the court below. The result is a clear conflict on an issue of law that goes to the heart of the power of Federal trial courts to control proceedings before them.*

2. The Court Below Brushed Aside the Clearly Erroneous Rule and the Abuse of Discretion Standard of Review

a. The Clearly Erroneous Rule

Respondents do not attempt to deny that the findings of fact made by the District Court were entitled to the protection of the clearly erroneous rule (*see* Pet. 17-18; Opp. 17). Instead, respondents argue that the Court of Appeals "was meticulous in following that rule throughout its opinion" and "made additional findings of fact only when the evidence was undisputed" (Opp. 17).

As already shown (*see* pp. 1-2 *supra*), this argument could not be more misleading. The truth is that the Court of Appeals departed sharply from the facts found by the District Court, although it found none of them to be clearly erroneous (Pet. 12-14, 18). In doing so, the Court of Appeals flagrantly violated the clearly erroneous rule. The plainest proof of this is the very fact that the respondents

* Even if the legal standard adopted by the court below were correct, it would not justify the result reached by the court below, because there was no basis for its implicit finding that the misconduct that occurred in this case would not recur (*see* Pet. 6, 23-24 *and* p. 6 *infra*).

have felt compelled to argue that there were no disputed facts in this case.

In light of the blatant violation of the clearly erroneous rule by the Court of Appeals, which infected its entire consideration of the merits of the appeal, the Court should grant the petition for a writ of certiorari, reverse summarily the judgment of the Court of Appeals, and remand for reconsideration on the basis of the facts found by the District Court. *Cf., e.g., National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). By doing so, the Court will make unmistakably clear that the findings of the District Courts cannot be flung aside in the cavalier manner followed by the Court of Appeals in this case.

b. The Abuse of Discretion Standard

We showed in our petition that there is a conflict among Circuits with respect to the standard of review of disqualification orders, with some Circuits adhering to the abuse of discretion standard and others, such as the Court of Appeals in this case, shifting to a broader standard of review (Pet. 19). Respondents attempt to deny the existence of this conflict among Circuits (Opp. 19-20 & n.8), but, as noted in our petition (Pet. 19 & n.****), it has been recognized by the courts themselves. Respondents also attempt to argue that the Court of Appeals followed the abuse of discretion standard in this case (Opp. 18-19), but the contrary is clear from the opinion of the Court of Appeals (*see* Pet. 20, 34a & n.44).

3. The Court Below Wrongly Held That an Attorney May Not Be Disqualified for Releasing Material Which Has Been Ruled Inadmissible With Intent to Circumvent the Ruling and to Prejudice an Opponent

We showed in our petition (Pet. 21-22) that for purposes of testing the holding of the Court of Appeals that Butler was immune from disqualification as a matter of law, it must be accepted that Butler acted with intent to circumvent the District Court's orders and to prejudice the defendant, and that Butler was guilty of a deliberate violation of the Code of Professional Responsibility. Respondents implicitly admit this (Opp. 12, 14, 17). They make no response to the showing in our petition (Pet. 21-24) concerning the importance of the legal question thus presented and the conflict between the holding of the court below and those of other courts, except to attempt to distinguish *State* v. *Kavanaugh*, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968), on the ground that in that case the disqualified attorney had shown an unwillingness to stay in bounds (Opp. 15 n.6).

In the present case, however, Butler not only manifested an unwillingness to obey the Code of Professional Responsibility in this case, but had a demonstrated prior propensity to use the press to disseminate inadmissible and prejudicial evidence (Pet. 6, 24). Thus Butler was properly disqualified even under the standard suggested by respondents. This Court should reverse the Court of Appeals to make clear that such flagrant evasion of court orders will lead to meaningful sanctions.

4. Attorney Disqualification Orders in Civil Cases Are Not Subject to Interlocutory Appeal Under *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984)

Respondents devote eight pages of their brief (Opp. 20-28) to an argument that the Court should not grant certiorari to decide whether attorney disqualification orders in civil cases are appealable under the principles enunciated in *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984). This argument is without merit.

Respondents first urge that "there is no reason for the Court to review that question at this time" because numerous cases have held disqualification orders in civil cases to be appealable (Opp. 20). Respondents fail to mention that all but two of these cases predated *Flanagan*, and are therefore no more relevant to the question presented than the heavy plurality of appellate courts that held disqualification orders in criminal cases to be appealable before *Flanagan* (*see* Pet. 25-26 and cases cited).

Next, respondents observe that the Court in *Flanagan* referred to the strength of the final judgment rule in criminal cases (Opp. 21). This observation is accurate, but it does not resolve the issue presented by this petition, which is whether the reasoning of this Court in *Flanagan* also applies to civil cases.

The rationale of *Flanagan* was that if an erroneous disqualification order would furnish an automatic basis for reversal of a final judgment, an interlocutory appeal would be unnecessary because the order would be reviewable on appeal from the final judgment; while if a showing of trial prejudice was required for reversal, such a showing would have to await the outcome of the trial. *See* 104 S. Ct. at 1056-57. As shown in our petition (Pet. 26-27), this reasoning is just as applicable to civil cases as it is to criminal cases. Respondents try to distinguish *Flanagan*

on the ground that the right to counsel in criminal cases stems from the Sixth Amendment, which does not apply in civil cases (Opp. 23). This argument overlooks the fact that the rationale of *Flanagan* applies whatever the source of the right being asserted. Respondents also argue that *Flanagan* could not be applied to civil cases because a post-trial showing of prejudice could never be made in civil cases (Opp. 23-25). The same argument was made by the losing parties in *Flanagan*,* and it has no more validity here than it did in *Flanagan*.

Finally, respondents argue that disqualification orders in civil cases should be appealable as a matter of policy (Opp. 26-28). They note that the issue of disqualification was first raised in this case after almost three years of litigation (Opp. 2), and allege (without any record support) that it was raised for delay (Opp. 27). The effrontery of this argument is astounding. The timing of the disqualification issue was not within the control of the defendant or of the District Court. It was dictated by the timing of the misconduct of Butler and Allis. The issue was raised promptly after the misconduct occurred, a fact of which respondents complain elsewhere in their brief (Opp. 6).

Indeed, the factor of delay cuts against respondents' position, not in favor of it. If it had not been for the interlocutory appeal taken by the respondents, this case would by now have been tried in the District Court, with six attorneys remaining to represent the plaintiffs (Pet. 3, 11), a fact nowhere mentioned in respondents' brief. If any prejudice were alleged to have resulted to plaintiffs from the fact that they were represented by six rather than eight attorneys at the trial, that allegation could by now have

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* *See* Reply Brief for Petitioners, pp. 2-3, 8-10, *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984).

been raised on appeal, together with any other claimed basis for appeal. This course would have been vastly more efficient for the parties and the courts than the course which was in fact followed by the respondents.

Conclusion

For the reasons set forth above and in the Petition for a Writ of Certiorari, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

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Respectfully submitted,

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